

# Afghanistan finally open for investigations

## ICC Prosecutor succeeds before the Appeals Chamber

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About 14 years after the Prosecutor of the International Criminal Court (ICC) started first examinations into the situation of Afghanistan, the ICC Appeals Chamber finally [authorized](#) investigations in March 2020. The situation relates to alleged war crimes and crimes against humanity committed in Afghanistan by US armed forces, the CIA, Afghan forces and the Taliban since 1 May 2003. With this decision, the Appeals Chamber amended the April 2019 [decision](#) of the Pre-Trial Chamber (PTC) II, rejecting the [request](#) of the Prosecutor by stating that an investigation would not serve the interest of justice (see para. 90 et seq). What were the reasons for the Appeals Chamber to amend the previous decision, what are its implications for further investigations and what are its political consequences? This article addresses these questions and gives a brief overview over the procedural history.

### The decision of Pre-Trial Chamber II

The much-criticized decision (see [Moreno Ocampo](#) and [Varaki](#)) of PTC II of 12 April 2019 was all about whether investigations into the situation in Afghanistan fulfilled the “interest of justice” – requirement set out in Art 53 (1) (c) Rome Statute. Accordingly, the Prosecutor shall consider whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. Ever since, pre-trial chambers have considered this factor when authorizing investigations initiated by the Prosecutor pursuant to Art 15 Rome Statute (so-called *proprio motu investigations*). In the present case, for the first time, a pre-trial chamber rejected a request on the grounds of interests of justice. PTC II stated that the interest of justice would not be fulfilled where investigations are not feasible and inevitably doomed to failure. Although it found that both the jurisdiction and admissibility requirements pursuant to Art 15 (4) Rome Statute were met, PTC II concluded that the prospects for a successful investigation and prosecution in the situation of Afghanistan were extremely limited. Furthermore, it stated that due to limited financial and personal resources of the Court, authorizing investigations into the situation of Afghanistan would be disadvantageous to other investigations pending before the Court. In June 2019, the Prosecution subsequently requested for leave to appeal, which was [partly granted](#) in September 2019.

### The judgement on the appeal

For the first time in the Court's history, an appeals chamber had to scrutinize a pre-trial chamber's decision pertaining to the authorisation of an investigation pursuant to Article 15 (4) Rome Statute. Beside the Afghanistan situation, since the entry into force of the Rome Statute, only four *proprio motu* investigations had been requested by the Prosecutor ([Kenya](#), [Côte d'Ivoire](#), [Georgia](#) and [Burundi](#)) and none of these requests had been denied by a pre-trial chamber so far.

On 5 March 2020, the Appeals Chamber unanimously amended the decision to the effect that it authorized the Prosecutor to commence investigations into the situation of Afghanistan. It came to the conclusion that a pre-trial chamber is not called under article 15 (4) Rome Statute to review the Prosecutor's analysis of the factors under article 53 (1) (a) to (c) Rome Statute. Instead, it is within the sole discretion of the Prosecutor to assess the interest of justice. That means that a pre-trial-chamber may only examine if there is a reasonable basis to proceed with an investigation and if the case appears to fall within the jurisdiction. Hence, the Appeals Chamber did not discuss the relation between the interest of justice and feasibility, but rather analysed the pre-trial chamber's competences to assess this factor at all. While the content of Art 53 (1) Rome Statute was the main point of interest in the decision of the PTC II, Art 15 (4) Rome Statute and its relationship to the latter took centre stage in the Appeals Chamber's judgement.

The Appeals Chamber based its findings on the fact that Art 15 (4) Rome Statute requires the pre-trial chamber only to examine whether there is a reasonable basis to proceed with an investigation and whether the case appears to fall within the jurisdiction of the Court. As the interest of justice is not mentioned in this provision, the Appeals Chamber concluded that the interest of justice was not relevant for the purposes of the pre-trial chamber's decision. On that point, the argumentation of the Appeals Chamber was pretty clear as it simply focused on the literal meaning of Art 15 (4) Rome Statute. In this regard it appears consistent that the Appeals Chamber alluded to interest of justice as a factor under Art 53 (1) Rome Statute (see e.g. para. 37) , whereas PTC II referred to it as a legal requirement (see para. 88).

Still, the Appeals Chamber had to consider rule 48 of the Rules of Procedure and Evidence, which poses a duty on the Prosecutor to assess the interest of justice also for investigations *proprio motu*. It thus systematically analysed the context between Art 15 (4) and Art 53 (1) Rome Statute, relying also on the intention of the parties and the Rome Statute's drafting history. In the view of the Appeals Chamber, Art 53 (1) Rome Statute is a separate provision in a different context, governing the initiation of investigations referred to the Prosecutor by a State Party or the Security Council and does not refer to an investigation *proprio motu*. With regard to rule 48, the Appeals Chamber found that there is no equivalent rule permitting judicial review over Art 53 (1) in the context of Art 15 (4) Rome Statute. Given that rule 48 was adopted after the Rome Statute, the Appeals Chamber concluded that it was not intended by the drafters to import these considerations into the authorisation process, since otherwise the drafters would have done so.

However, this line of argumentation is not obvious at first sight and also lead to a [separate opinion](#) of Judge *Luz del Carmen Ibáñez Carranza*: while the argumentation with regard to Rule 48 seems convincing, it is not really clear why Art

53 (1) Rome Statute would only apply to referrals by a State Party or the Security Council. Moreover, if Art 53 (1) Rome Statute was not applicable to *proprio motu* investigations, there would be no judicial control over a prosecutor's decision not to investigate in a given situation. For this reason, Judge Ibáñez Carranza, though supporting the outcome of the Judgement, suggested not to implement these obiter dicta statements in future scenarios. Indeed, against that background, it might have been sufficient for the purposes of the present judgement to rely on the different wording of Art 15 (4) with respect to Art 53 (1) Rome Statute as well as the drafting history.

### **Is the judgement really a milestone?**

Instead of interpreting the substantial meaning of interest of justice, the Appeals Chamber stopped any further discussion right at the procedural stage and thus set a precedent for future authorizations of *proprio motu* investigations. Even if the Appeals Chamber might have missed or avoided the chance to take a stand on the relationship between justice and feasibility, it clearly stated that future requests shall not be reviewed with regard to the interest of justice factor at all. However, for the supporters of the ICC and – more importantly – the victims of the Afghanistan war, the outcome of the judgement remains the same: the situation in Afghanistan is finally open for investigations. Taking note of the result of the proceedings, considering the length of the preliminary proceedings and not least the impact for future *proprio motu* investigations, the judgement thus indeed marks a milestone.

Still, the toughest part is yet to come as the US very recently and unequivocally, revealed its view on the authorisation of such investigations and the enforcement of public international law in general. On 17 March 2020, Secretary of State Pompeo [announced](#) that the US will oppose the jurisdiction of the ICC and that he is about to examine “next steps” against two explicitly named ICC staff members and their families. The message is thus quite clear on that point: the US will not cooperate with the ICC and implement measures of a statute it has not even ratified. The ICC took note of these threats and [emphasized](#) that it will continue “[to] fight[ing] impunity for the world’s gravest crimes, contributing to their prevention, and providing justice to victims” (see also the [statement](#) of former officials of the ICC). It thus remains to be seen how investigations will proceed in the months ahead: although PTC II erred in exercising judicial control over the interest of justice factor, the actual discussion indicates that it touched upon a very sensitive matter by concluding that prospects for a successful investigation and prosecution were extremely limited in the case of the Afghanistan situation. Nonetheless, justice should not be determined by its chances of success, but rather by the possibility to have access to it.

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